



IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1534

SOUTH CENTRAL BELL TELEPHONE COMPANY,
Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
Respondent.

REPLY BRIEF

VICTOR A. SACHSE, Jr.
Breazeale, Sachse & Wilson
P.O. Box 3187
Baton Rouge, Louisiana 70821
(504) 387-4000

NORMAN C. FROST
M. ROBERT SUTHERLAND
600 N. 19th Street
Birmingham, Alabama 35201
(205) 321-3780

J. ROBERT FITZGERALD
1215 Prytania Street
New Orleans, Louisiana 70140
(504) 568-1818

Counsel for Petitioner

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1. Contrary to respondent's portrayal, petitioner has raised a narrow but fundamental question that is highly significant to all ratemaking proceedings, both federal and state, and for all public utilities and regulatory agencies. The issue presented is whether a state regulatory agency in setting rates may require a utility to make refunds based on *estimates* for a past period while refusing to consider actual *results* which show those estimates to be incorrect.

2. The commission concedes the essential facts needed to resolve this issue: (a) on remand from the Louisiana Supreme Court, the commission in February, 1978 undertook to fix a schedule of rates from June 1976 forward (response 11-12); (b) actual operating results for 1976-1977 were submitted to the commission (response 12);

(c) in ordering refunds of \$15 million, the commission did not take into consideration actual results but used its *ex parte* estimates without any evidentiary hearings (response 9, 12).

3. These simple facts are neither unique nor more complex than those before the Court in *West Ohio Gas*. To the contrary, they are straightforward and represent a significant problem in regulatory practice. See, e.g., *New England Telephone & Telegraph Co. v. Public Utilities Commission*, 376 A.2d 1041 (R.I. 1977); *Mountain States Telephone & Telegraph Co. v. New Mexico State Corporation Commission*, 563 P.2d 588 (N.M. 1977); *Mountain States Telephone & Telegraph Co. v. Public Utilities Commission*, 502 P.2d 945 (Colo. 1972); *New York Telephone Co. v. Public Service Commission*, 272 N.E.2d 554, (N.Y. 1971).

4. Respondent ignores the fundamental issue, offering instead a myriad of irrelevant and immaterial procedural questions which are neither involved in nor necessary to the resolution of the issue by the Court.¹ This case does not

¹The commission's suggestion of impropriety in the handling of the district court judgment and its protests that it had insufficient time to analyze the actual operating results for 1976-1977 are examples of the wholly groundless as well as irrelevant and immaterial barriers the commission attempts to raise. Petitioner, as the party in whose favor the district court's judgment was rendered, prepared a draft of the judgment which is the custom in the district court. The draft was presented to the court, signed by the presiding judge and became the district court's decision, not petitioner's. The commission's suggestion of insufficient time to analyze actual results is likewise groundless. The results were taken from petitioner's books, kept in accordance with the Uniform System of Accounts mandated by the commission. Moreover, there was no time limit in the remand order leading to the commission's action in January, 1978, more than one year after the 1976 results were filed with the commission.

involve retroactive ratemaking; test year methodology; action of the district court; requirement of an attrition allowance; institution a new rate case on remand; or the other irrelevant matters discussed in the commission's response. The commission's attempt to insulate this case from the *West Ohio Gas* principle and the decisions of other state courts on the basis of artificial procedural barriers rings hollow, particularly in contrast to the constitutional principle at stake.

5. The commission's refund order of January 25, 1978 was based on *estimates* of the effect of inflation for 1976-1977 when *results* were before it that showed those estimates to be wrong. The Louisiana Supreme Court affirmed the refund order. The petition here complains of those actions. The commission's groundless protest that the district court did not allow sufficient time for consideration of the proffered results and that the Louisiana Supreme Court's remand did not provide for such consideration cannot justify the constitutional deprivation.

6. The commission's reliance on *Hope Natural Gas* is misplaced. Again, the commission misconstrues the issue presented to the Court. This only emphasizes the confusion and conflict existing among some regulatory commissions over the application of *West Ohio Gas*. *Hope Natural Gas* is consistent with this Court's holding in *West Ohio Gas* and supports petitioner's position in the present case. *Hope Natural Gas* refers to the "end result" of a commission's order as a test of its validity. The end result of the actions challenged here is that petitioner is required to refund \$15 million of revenues which the facts show were already inadequate. The sole justification for the refund depends on untested "guesses" or "conjecture" which the facts

show to be erroneous. Such a result is not condoned by either *West Ohio Gas* or *Hope Natural Gas*.

7. The commission's attempt to distinguish *West Ohio Gas* on the basis that it did not involve a remand is wholly without merit.² In the case of *New England Telephone and Telegraph Co. v. Public Service Commission*, 376 A.2d 1041, 1047 (R.I. 1977), the Supreme Court of Rhode Island disposed of a similar contention:

"It seems unreasonable for the Commission on a remand in 1976 to attempt to 'predict' what effect inflation will have in 1975 and 1976, based only on 1974 data, when the actual facts are known."

In the case of *New York Telephone Co. v. Public Service Commission*, 272 N.E.2d 554, 556 (N.Y. 1971), the Court of Appeals of New York, in discussing the *West Ohio Gas* principle stated:

"This principle applies not only in cases where the rate proceeding fixes the rate but especially where the Commission directs refunds."

The present case is indistinguishable from *West Ohio Gas*. Here, the commission in February 1978 fixed rates and ordered refunds for 1976 and 1977 without considering actual results for those years, just as the Ohio Commission in 1933 fixed rates for 1930 and 1931 without considering actual results. In both instances, as this Court pointed out in *West Ohio Gas*:

"'elaborate calculations which are at war with realities

²The commission's attempt to narrow the factual basis of the *West Ohio Gas* holding to mathematical errors (response 22) is particularly misleading. The Court in *West Ohio Gas* stated:

"Errors of computation such as these are far from exhausting the list of defects in these proceedings. There are others more clearly vital." 294 U.S. at 81.

are of no avail.' *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 164. . . . A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment." 294 U.S. at 82.

9. The commission has failed to come to grips with the fundamental issue presented by petitioner. It fixed rates in 1978 for a past period and ordered refunds based on incorrect estimates of what happened in that period. It refused to consider the actual results for those years. That action cannot be justified.

10. The issue presented is not limited to this case. Continuing inflation in the nation's economy makes it an important and timely issue of broad constitutional importance in the field of regulatory law. It has been recognized by at least one state Supreme Court to have "recently grown to be a significant problem."³

³*New England Tel. & Tel. Co. v. Public Util. Comm'n.*, 376 A.2d at 1046.

Respectfully submitted,

VICTOR A. SACHSE, JR.

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